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No. 01-941

In The

Supreme Court of the United States

20TH CENTURY INSURANCE COMPANY,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES; LINDA P. AHLES,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INSURANCE POLICY SUIT LIMITATIONS PROVISIONS ARE SUBSTANTIVE CONTRACT PROVISIONS, NOT STATUTES OF LIMITATION.

Petitioner 20th Century explained that, by enacting California Code of Civil Procedure section 340.9, the California Legislature has unconstitutionally negated a suit limitations provision in hundreds of thousands of insurance contracts for claims concerning one particular event – the 1994 Northridge earthquake. Respondent Linda Ahles asserts the provision is not contractual, but simply a statute of limitations that the Legislature is free to change retroactively.

In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Court rejected an argument like respondent's under similar circumstances. The insurance carriers there were relying on a one-year limitation provision *in an insurance contract*, but there was also a one-year limitation provision *in a statute* in the jurisdiction (Mexico) under which the contract was made. *Id.* at 403, n.1. When the courts of another jurisdiction (Texas) refused to honor the one-year limitation because its legislature had enacted a longer statute of limitations, this Court intervened, finding an unconstitutional deprivation of due process.

The Texas courts, this Court held, had "confused [the carriers' contractual] defense with that based on" the parallel statutory limitation period (*id.* at 411) and concluded that a state could not negate the contractual defense as it could do to the statutory defense. Expressly distinguishing *Campbell v. Holt*, 115 U.S. 620 (1885), on

which respondent heavily relies, the Court said that "[t]here is a clear difference between the revival of a liability which is unenforceable *only* because a statute has barred the remedy regardless of the will of the parties, and the extension of a liability beyond the limit expressly agreed upon by the parties." *Home Ins. Co.*, 281 U.S. at 409, n.6 (emphasis added). In language directly applicable here, the Court held:

> [Cases] in which it was held that a state may lengthen its *statute* of limitations, are not in point. [Citations.] In those cases, the parties had not stipulated a time limit for the enforcement of their obligations. It is true that a state may extend the time within which suit may be brought in its own courts, *if, in doing so, it violates no agreement of the parties*. . . . [But when] the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

Id. at 408-09 & n.6 (emphasis added).

Respondent's argument – and the California Court of Appeal's opinion – suffer from the same fundamental confusion as the failed position in *Home Ins. Co. v. Dick*. Petitioner here is relying on the one-year limitation *in its insurance contract* with respondent. It doesn't matter – as it didn't in *Home Ins. Co. v. Dick* – that a one-year limitation is also provided by statute. Indeed, it would be particularly inappropriate for the existence of the statutory limitation period to be treated as the California Legislature's license to void the contractual limitation

period, because the long-standing practice of insurers to include in policies time limits for lawsuits substantially predates the statutory limits. A legislature should not be able to coopt a contract term by enacting it into a statute. Such a "codify and modify" strategy cannot avoid the constitutional protections promised to the contracting parties.

II. SECTION 340.9 IMPAIRS HUNDREDS OF THOUSANDS OF INSURANCE AND SETTLEMENT CONTRACTS.

Respondent tries to minimize the impact of section 340.9 by asserting that few lawsuits have been filed under the statute. But she overlooks the fact that insurers may have settled claims made under section 340.9 because of the difficulty and expense of defending lawsuits on claims that were unexpectedly revived seven years after the earthquake. Moreover, as shown in 20th Century's accompanying lodging with this Court, in just the last few weeks of December 2001, well over 1000 plaintiffs filed lawsuits under section 340.9 in the Los Angeles Superior Court. That court has been forced to enter three separate stay orders as it attempts to deal with this influx of section 340.9 litigation.[1]

Respondent also claims section 340.9 does not void any settlements, and mentions settlements only to

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[1] 20th Century requests that this Court take judicial notice of the lodged material, which includes the three stay orders. As true and correct copies of records of a court of California, these orders are the proper subject of judicial notice. Fed. R. Evid. 201(b).

describe where section 340.9 will not apply. (Opp. 5.) But section 340.9 excludes only one class of settlements from its application – those signed by California counsel. Cal. Code Civ. P. § 340.9(d)(2) (excluding from revival only those claims settled in a "written compromised settlement agreement . . . where the insured was represented by counsel admitted to the practice of law in California . . . who signed the agreement.") To the extent it is construed to revive claims that would otherwise be barred by valid settlement agreements that were not signed by California counsel, section 340.9 also impairs settlement contracts. As we have explained, settlement contracts are protected by the contract clause like any other contractual agreement.

Section 340.9's impairment of an entire class of favored settlement agreements is total if it negates negotiated contracts whenever an insured – even one represented by counsel – accepted settlement benefits, but California counsel did not sign the settlement agreement. Under that reading of the statute, a great many final settlements would be reopened by section 340.9 – settlements that insurers reasonably believed barred "reopening of the issues settled." *A. J. Industries, Inc. v. Ver Halen*, 142 Cal. Rptr. 383, 388, 75 Cal. App. 3d 751, 759 (1977).

III. IT WOULD HAVE BEEN FUTILE TO RAISE AN EX POST FACTO CLAUSE ARGUMENT IN THE LOWER COURTS.

In its petition, 20th Century also asked this Court to "reconsider *Calder* and its progeny to determine whether a retroactive civil law . . . is nonetheless unconstitutional

under the *Ex Post Facto* Clause." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998). 20th Century explained this is an appropriate case for the Court to reconsider *Calder* and rule that, when a state legislature retroactively eliminates vested rights in 600,000 contracts or more, with no finding of misconduct by the contracting parties, nor of necessity for the statute, the act violates the ex post facto clause.

In response, respondent argues only that this issue was not raised in the California courts. (Opp. 9-10.) But 20th Century obviously could not have asked the intermediate state court below or the California Supreme Court to reconsider this Court's precedent. *See generally Cedars-Sinai Med. Ctr. v. Superior Ct.*, 954 P.2d 511, 514, 18 Cal. App. 4th 1, 7 (1998) (highest court is the only court that can reverse its own decisions, and thus arguments against existing authority need only be presented to that court). 20th Century presented its argument at the first opportunity, and this Court should grant the petition to address this important issue.

CONCLUSION

This case involves the destruction of hundreds of thousands of private contracts, based on the "feelings of the moment" and "sudden and strong passions" of one state's legislature. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (majority opinion of Marshall, C.J.). Section 340.9's negative impact threatens to extend beyond the

insurance industry to the country's entire business environment. Approving such a profoundly expansive governmental intrusion into private contractual obligations, years after the fact, must gravely concern banks, manufacturers, landlords, and others who depend on contractual business relations. This Court should grant the petition.

Respectfully submitted,

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